IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITOIN NO.255 OF 2003

Kailas Janardan Gaikwad ..Petitioner

Vs.

Mrs.Manjula Kailas Gaikwad
& Ors. ...Respondents

...
Mr.Uday Warunjikar Advocate for Petitioner
Mr.Harshad E.Palwe for Respondent no.1
Mr.Rajesh More A.P.P. for State
...

CORAM: SMT.V.K.TAHILRAMANI,J.

DATE : JULY 11,2005

P.C.

1. Heard the learned advocate for the petitioner-husband and learned advocate for the respondent no.1 i.e. the wife and Respondent no.2-son.

2. By order dated 26.4.2001 passed by J.M.F.C.Igatpuri, the respondent no.1-wife was granted maintenance of Rs.750/- per month and son was granted maintenance of Rs.300/- per month. The said order came to be challenged by the petitioner

before the Sessions Court. The Sessions Court by order dated 18.11.2002 dismissed the revision. Being aggrieved by the said order this petition has been filed.

3. It is the case of the petitioner that he engaged one Shri.R.C.Gupta as counsel and thereafter as Shri.R.C.Gupta was appointed as A.P.P. there was no communication between the petitioner and his counsel. Resultantly, the matter before the trial Court proceeded exparte and order granting maintenance was passed exparte. The evidence of the petitioner was not recorded nor the counsel on behalf of the petitioner has cross-examined the witness i.e. P.W.2 Hira Pol who is from Mahila Hakka Sarankshan Samiti. Hence, it is urged that sufficient opportunity was not given to the petitioner, hence the matter be remanded back to the trial Court for fresh hearing. The main contention of the petitioner is that he was not given sufficient opportunity to contest the application for maintenance preferred by respondent nos. 1 and 2 before the trial Court.

4. It is also the contention of the petitioner that respondent no.1 is not his wife and the first husband of the respondent no.1 has filed affidavit which was produced during the hearing of the criminal revision before the Sessions Court wherein it is stated that his marriage was performed with respondent no.1 and said marriage is still subsisting. Thus, it is the case of the petitioner that the respondent no.1 is not his legally wedded wife and respondent no.1 failed to prove that respondent no.2 was born out of wedlock with the petitioner.

5. In respect of the first contention that the petitioner was not given sufficient opportunity to contest the maintenance application before the trial Court, it is seen that his counsel Shri.R.C.Gupta has cross-examined respondent no.1 i.e. wife. Thereafter, as the petitioner consistently remained absent, Shri.R.C.Gupta issued notice (Exh.20) to the petitioner by R.P.A.D. The office copy of the said notice (Exh.20) and the acknowledgment receipt have been produced and they are on the record of the trial Court at Exhs. 29

and 30. The consequences of the non-appearance of the petitioner were clearly mentioned in the notice (Exh.20). So also the next date of hearing was informed to the petitioner. However, inspite of receipt of this notice (Exh.20) the petitioner chose to remain absent on the next date. On account of this his advocate Shri.R.C.Gupta filed no instructions pursis before the trial Court and sought permission to withdraw his appearance from the case. The said pursis is at Exh.27. In view of these facts and circumstances the trial Court has accepted the said pursis and permitted Shri.R.C.Gupta to withdraw his appearance. This was done in the light of the office copy of the notice (Exh.20) and acknowledgement receipt.

6. The main contention of the petitioner is that the petitioner was not given proper opportunity by the trial Court for leading additional evidence. It may be stated here that prior to all these events taking place as stated earlier, the respondent no.1 i.e. wife had already been cross-examined. After Shri.R.C.Gupta withdrew his appearance evidence of only one witness Hira Pol

from the Women Protection Rights Committee at Nashik remained unchallenged as there was no cross-examination on behalf of the petitioner. Though the petitioner was aware of the next date of hearing, the petitioner remained absent and hence, the trial Court was constrained to close the evidence and proceeded to pass the judgment and order. In its order Exh.1, the trial Court has set out in detail the reasons which impelled it to proceed exparte as in the opinion of the trial Court, the petitioner had deliberately not appeared before the trial court with a view to protract the hearing of the case. The order of the trial Court in the facts and circumstances of this case, is just, legal and proper. When the petitioner repeatedly remained absent and when the witnesses for the respondent were present before the Court, it cannot be said that the trial Court has committed any error in proceeding exparte against the present petitioner. Moreover, the trial Court is clearly justified in taking such step in view of Section 126(2) of Code of Criminal Procedure.

. It is to be noted that the reasons given by the

petitioner in his revision application for non-appearance of the petitioner in the trial Court is not a correct and proper one. It is stated in the revision in para 7 by the petitioner that he was represented by Advocate Shri.R.C.Gupta in the trial Court who was selected as A.P.P. As there was no communication from his advocate he was not aware of date of hearing. The stand taken by the petitioner is on the face of it, false, because record of the trial Court reflects that petitioner was very much aware of the next date of hearing i.e. 14.2.2001 vide notice Exh. 20. Yet the petitioner chose to remain absent. The petitioner had adopted a similar behaviour when notice was given to him in relation to the application. In relation to the application also, he remained absent, hence, exparte order came to be passed against him. However, thereafter he was allowed to take part in the proceedings though he appeared after the exparte order was passed. Apparently, the petitioner was under impression that on this occasion also the Court would show leniency and would allow him to take part in the proceedings even after the exparte order was passed.

7. The reasons given in the revision by the petitioner is not at all a correct one and in fact it is false to the knowledge of the petitioner and is contrary to the record. Record shows that he received notice (Exh.20) from his Advocate Mr.R.C.Gupta informing him of the next date and other facts. In spite of this he remained absent. Thus, the contention of the petitioner that he was not communicated date of hearing by his advocate, cannot be relied upon at all. Hence, prayer for remand of the case cannot be granted.

8. The second contention of the petitioner is that respondent no.1 was earlier married to one Sanjay Jadhav and the said marriage was still in existence. In this respect, it is pertinent to note that respondent no.1 i.e. wife was cross examined at length, however, nothing was elicited in her cross examination in relation to the existence of the earlier marriage. The petitioner for the first time, had brought out this fact during the hearing of the revision application wherein he placed reliance on the affidavit of one

Sanjay Jadhav in which it is stated that he was married to respondent no.1 and the marriage was in existence. In this connection, it would be pertinent to note that the petitioner himself had sent a notice to respondent no.1 on 27.7.1998 i.e. much prior to the filing of the application for maintenance by respondent no.1 before the trial Court. In the said notice the petitioner has admitted in clear terms that his marriage with respondent no.1 was performed on 22.1.1995 at village Pahine as per the rites and customs of Baudha religion. It is stated in the said notice that marital relations are still subsisting and out of this wedlock, son by name Sunit i.e. respondent no.2 is born. That the petitioner issued this notice to respondent no.1 is not at all disputed. In fact, it was got elicited by the petitioner during the cross examination of respondent no.1. As stated earlier, in the said notice, the petitioner has categorically admitted the legality and validity of his marriage with respondent no.1 and further fact that respondent no.2 Sumit is born out of the said subsisting legal wedlock.

9. The petitioner has placed reliance on one application given by respondent no.1 to Mahila Hakka Sarankshan Samiti. It is his contention that in the said application respondent no.1 has stated that her marriage had taken place with the petitioner as per 'Gandharva Vihav rites'. Thus, it is contended that no legal and valid marriage took place between the petitioner and respondent no.1. It is pertinent to note that the notice dated 27.2.1998 is given by the petitioner to Respondent no.1 after the application was given by her Mahila Hakka Sarankshan Samiti. This fact can be made out from the fact that there is a clear-cut mention of the said fact in the notice itself. In the notice dated 27.2.1998, the petitioner has in terms admitted his marriage and that Sumit is his son. In view of this, the stand taken by the petitioner appears to be belated and false.

10. The learned advocate for the petitioner placed reliance on the decision of this Court in the case of **Maharashtra State Electricity Board, Mumbai and another Vs. Vikas Kisan Nehete and others; [2005(3) Mh.L.J. 371]**. He has submitted that in

that case also the application was made for setting aside the exparte order against M.S.E.B. In the said case, during the pendency of the complaint, Advocate for the applicant had joined judicial services and he had not informed the M.S.E.B. so that it could take steps to engage another advocate. In the said case, exparte order came to be set aside. I have perused the said decision. It is true that the exparte order came to be set aside however, the said exparte order against M.S.E.B. came to be set aside after the Court reached the conclusion that there was absolutely no fault on the part of M.S.E.B. in not remaining present on the date of hearing and participating in the proceedings. However, the situation in the present case is not the same. In the present case despite notice being given to the petitioner informing him of the next date and the consequences of non-appearance, the petitioner has not appeared before the trial Court. Hence, this decision would not be applicable to the case at hand.

11. Looking to the facts and circumstances of this case, in my opinion, ample opportunity was given to

the petitioner to adduce his evidence and to cross-examine the witness, however, he has failed to do so. On the record, there is no legal evidence to prove that respondent no.1 was married to Sanjay Jadhav and the said marriage was still subsisting. As observed by me earlier, the reasons given by the petitioner for non-appearance of the petitioner in the trial Court is not a genuine one. In this view of the matter, I do not think that this is a fit case to set aside the order passed by the learned Magistrate as well as the order passed by the learned Sessions Judge. So also no case is made out for remand of the matter to the trial Court.

12. Writ Petition is rejected.

[V.K.TAHILRAMANI,J.]